Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services for	)	CG Docket No. 03-123
Individuals with Hearing and Speech	)	
Disabilities	)	
	)	

VERIZON'S COMMENTS ON PAYMENT FORMULA AND FUND SIZE ESTIMATE FOR INTERSTATE TRS FUND FOR JULY 2005 THROUGH JULY 2006

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VERIZON'S[1] COMMENTS ON
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In its current Interstate Telecommunications Relay Payment Formula and Fund Size Estimate *("Payment Formula and Fund Size Estimate")* for July 2005 through July 2006, the National Exchange Carrier Association's ("NECA") has excluded categorically providers' marketing and advertising costs in violation of the Commission's rules. NECA's actions violate Commission precedent, which allow providers to recover the costs reasonable marketing and advertising programs. In addition, NECA has no authority to change the Commission's rules. Only the Commission can do that, and if the Commission wants to do that, it can do so only prospectively and only if it first provides notice and an opportunity for public comment, as required by the Administrative Procedure Act ("APA"). NECA also increased demand projections for VRS services but failed to account for the effect such an increase might have on individual providers' costs for VRS services or to provide any information that would allow providers to evaluate these costs and provide data necessary for NECA to set an appropriate rate. For the reasons stated below, the Commission should direct NECA to revise its costs calculations

1 The Verizon Companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

to include providers' marketing and advertising costs and allow providers to submit additional data reflecting increased costs associated with NECA's revised demand projections for VRS.

I. NECA Improperly Excluded Providers' Marketing/Advertising Costs.

In October 2005, NECA distributed its annual data requests and instructions to TRS providers. In response to these requests, TRS providers submitted data relating to demand for TRS services and various costs of providing these services. These costs included, among other things, costs for marketing and advertising TRS services and outreach programs as well as fixed costs such as facilities, utilities, and building maintenance. In its instructions, NECA defined "marketing/advertising" costs as "[e]xpenses associated with promoting TRS services within the community."[2] Similarly, "outreach" costs were defined as including: "[e]xpenses of programs to educate the public on TRS."[3] These definitions have been in place as part of the Relay Services Data Request Instructions for years.

Verizon submitted its initial response to NECA's data request on January 16, 2006, and included in that response expenses associated with Verizon's TRS marketing/advertising and outreach efforts. Because marketing and advertising expenses have been included in NECA's cost calculation in the past and because NECA gave no indication that these costs would be excluded from its cost calculations, Verizon reported as marketing/advertising expenses all expenses being coded to Verizon's marketing department for accounting purposes. Although expenses in this category included expenses for things such as personnel devoted exclusively to outreach activities or operational and technical support, Verizon did not determine whether expenses falling under the umbrella of the marketing department should be allocated to other

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2 *See* NECA's Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket No. 03-123 (filed May 1, 2006) at Appendix A4. (*"Payment Formula and Fund Size Estimate"*).

3 *Id.*

expense categories as defined by NECA. Based on NECA's past practices, Verizon believed that all marketing expenses would be included by NECA in the formulation of rates.

Over the next few months, Verizon filed several revisions responding to requests for additional information from NECA. Although NECA's "Schedule of Activities" for its data collection process indicated that it would, between March 1 and March 10, "schedule conference calls with providers … to discuss specific disallowances," NECA never informed Verizon that it planned to exclude marketing/advertising costs in its 2006-2007 calculations. Verizon submitted its final revisions and data responses on March 10, 2006, but made no revisions to its marketing/advertising expenses.

Verizon subsequently received a letter from NECA stating, without any explanation, that all of Verizon's marketing and advertising costs had been excluded. In its May 1, 2006 *Payment Formula and Fund Size Estimate*, NECA excluded marketing and advertising costs for all providers based on its "understanding that costs of providers marketing their own TRS services are not includable in the formulas …." NECA noted, however, that "outreach expenses", which it now defines as "the projected costs of notifying consumers of service availability," had not been categorically excluded.[4] The Commission should reject NECA's proposal to exclude providers' marketing and advertising expenses for three reasons.

First, the Commission's rules require providers to market and advertise the availability of TRS services to assure that consumers are aware of the availability of all forms of TRS. The rules also expressly allow for compensation from the TRS Fund for reasonable expenses associated with these requirements.[5] Section 64.604(c)(iii)(3) of the Commission's rules states:

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4 *Payment Formula and Fund Size Estimate* at 8.

5 *See* 47 C.F.R. § 64.604(c)(5)(iii)(E).

> Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TTY numbers in telephone directories shall assure that callers in their service areas are aware of the availability and use of all forms of TRS.

47 C.F.R. § 64.604(c)(iii)(3). These activities clearly fall within the rubric of marketing and advertising by any definition, including NECA's, which defines marketing and advertising expenses as those "associated with promoting TRS services within the community." Although NECA attempts to draw a distinction between this type of marketing and advertising and the "costs of providers marketing their own TRS services,"[6] the Commission's precedent makes no such distinction.

To the contrary, the Commission repeatedly has reminded providers of their obligation to market and advertise TRS services. In its *First Report and Order* relating to TRS services, the Commission clarified that "the current rule obligates carriers to assure that "'callers'" in their service areas are aware of TRS."[7] The Commission explained:

> It is crucial for everyone to be aware of the availability of TRS for it to offer the functional equivalence required by the statute. As Congress has stated, TRS was designed to help bridge the gap between people with hearing and speech disabilities and people without such disabilities with respect to telecommunications services. The lack of public awareness prevents TRS from achieving this Congressionally mandated objective.[8]

In its *June 2004 Order*, the Commission expressed concern about efforts to make all consumers aware of the uses and availability of TRS services and reiterated that its "regulations reflect that it is the duty and responsibility of common carries obligated to provide TRS to ensure that the

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6 *Payment Formula and Fund Size Estimate* at 8.

7 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 105 (2000) ("*First Report and Order").*

8 *Id.*

public is aware of TRS."[9] Furthermore, although the Commission declined to permit or require the TRS Fund to fund a *national* outreach campaign, the Commission confirmed that providers may receive compensation from the TRS Fund for reasonable expenses associated with complying with this requirement.[10] NECA's categorical exclusion of *all* marketing and advertising expenses, therefore, cannot be justified under the Commission's precedent.

Although it is unclear whether NECA intended to exclude all marketing/advertising expenses or just those associated with providers' efforts to market their own TRS services, as NECA's Payment Formula and Fund Size Estimate suggests,[11] providers had no opportunity to separately identify company-specific marketing/advertising expenses from general marketing/advertising expenses or to distinguish marketing/advertising expenses, as NECA now defines them, from outreach activities.

For years, marketing/advertising expenses and outreach expenses have been defined nearly synonymously in NECA's data request instructions to providers. Those instructions define "marketing/advertising" expenses as "expenses associated with promoting TRS services within the community."[12] "Outreach" expenses are defined as "expenses of programs to educate the public on TRS."[13] Neither definition draws a distinction between expenses associated with providers marketing and advertising or offering outreach for their own TRS services and expenses associated with providers engaged in non-company-specific marketing/advertising or

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9 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, ¶ 95 ("*June 2004 Order*").

10 *Id.* at ¶ 97 ("These costs, as we have noted, may include costs attributable to reasonable outreach efforts, and in this way some of the costs for outreach are already supported by the Interstate TRS Fund").

11 *Payment Formula and Fund Size Estimate* at 18.

12 *Payment Formula and Fund Size Estimate* at Appendix A4.

13 *Id.*

outreach efforts. Without notice from NECA that it would base its exclusion on such a distinction, providers had no reason to separate company-specific marketing/advertising from non-company specific marketing/advertising.

In addition, because of the similarity in NECA's definitions for marketing/advertising and outreach expenses, and the overlap in services providers offer under these two categories, as described more fully below, Verizon previously has had no reason to more specifically delineate marketing/advertising expenses and expenses associated solely with outreach activities. In fact, in some instances, Verizon has included in its marketing/advertising expense category expenses clearly associated with outreach activities, particularly where those expenses are allocated for company budgeting and accounting reasons to Verizon marketing department. Even under a narrower definition of outreach activities that includes "the projected costs of notifying consumers of services availability," many of the expenses Verizon has allocated to marketing/advertising activities could properly be categorized as outreach expenses. When these more careful distinctions are made, they have significant effect on the expenses reported in each category.

Moreover, as its relates to fundamental fairness and the integrity of the rate setting process, NECA told providers that it would discuss any proposed disallowances with providers prior to submitting its final proposal to the Commission, yet NECA failed to do so, despite the fact that NECA was engaged in discussions with providers during the time providers were responding to NECA's data requests. Had NECA informed providers that it planned to exclude marketing and advertising expenses and explained the basis for those exclusions, providers could have addressed those issues with NECA during that time and made appropriate revisions to their data responses prior to finalizing them and submitting them to NECA for consideration. Instead, NECA has forced providers to explain, after the fact, why NECA's proposed payment formulas are flawed. Not only is this process inefficient, the trend over the last few years confirms that this approach effectively places providers in a regulatory position equivalent to trying to close the barn doors after the cows have gone out.

Second, NECA has no authority to change Commission precedent and now exclude marketing and advertising expenses in calculating TRS Fund costs. Only the Commission can change its rules, including its costing methodology for TRS Fund recovery. But if the Commission wants to do that, it can only do so prospectively, and it must first give providers notice and a meaningful opportunity to be heard, as required by the Administrative Procedure Act ("APA"). Section 552 of the APA requires government agencies, and agents acting on delegated authority, to provide notice and an opportunity to comment on proposed agency rule changes.[14] Where an agency ""encodes a substantive value judgment"", or sets "substantive standard," notice and comment is required before the rule change may be adopted.[15] This assures that an agency, or its agent, has before it the facts and information relevant to addressing a particular issues as well as alternative solutions.

In excluding providers' marketing and advertising expenses in calculating TRS Fund costs, NECA departed significantly from prior FCC and NECA practice and from its own definitions of these services and effectively changed the underlying standards that applied in calculating TRS providers costs. NECA, however, failed to inform providers of it proposed exclusions or to gather public comment on the effect, legally or practically, of its proposed methodology change. Instead, providers learned for the first time that NECA had categorically excluded marketing and advertising expenses in calculating TRS fund costs when NECA

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14 The APA's provisions for notice and comment are set forth in 5 U.S.C. § 552.

15 *See JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 327-28 (D.C. Cir. 1994).

submitted its proposed Payment Formula and Fund Size Estimate to the Commission. NECA's failure to inform providers of its change in methodology and to obtain input prior to submitting its proposal to the Commission provides a perfect example of the types of problems that occur when notice and comment requirements are not followed. In this case, NECA's action has caused unwarranted ambiguity and inaccuracy, as described above, and amounts to nothing less than an abuse of process.

Third, as a matter of public policy, marketing and advertising expenses should be included in TRS providers' cost recovery because these activities are essential to supporting outreach efforts, which the Commission has long recognized is essential to ensuring functional equivalency.[16]

In this regard, TRS marketing and advertising serves a different purpose than marketing and advertising to non-hearing-and-speech impaired consumers. TRS marketing and advertising supports outreach efforts through the creation of collateral materials such as product fact sheets and "how to guides" that teach users about TRS products and services. TRS marketing and advertising personnel also draft materials Verizon's outreach organization uses to promote awareness of TRS products and services through text blasts and emails to the hearing-and-speech-impaired community. These activities are not directed at promoting the Verizon band or

16 *See First Report and Order*, ¶ 105 ("It is crucial for everyone to be aware of the availability of TRS for it to offer the functional equivalence required by the statute"); *June 2004 Order*, ¶ 95 ("Those who rely on TRS for access to the nation's telephone system ... gain little from the mandate of Title IV if persons receiving a TRS call do not understand what a relay call is and therefore do not take the call, or if persons desiring to call a person with a hearing or speech disability do not know that this can easily be accomplished through TRS (and dialing 711)"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Statement of Commissioner Kevin J. Martin on Declaratory Ruling and Further Notice of Proposed Rulemaking (released May 3, 2006) ("The Commission's work [is] to ensure that all Americans have full access to communications and emergency services.").

increasing market share. In turn, the marketing/advertising department uses feedback from the outreach staff to make product enhancements and improvements necessary to ensure that TRS products and services meet minimal standards for "functional equivalency".

TRS marketing/advertising personnel also provide TRS product support by managing products through their lifecycle to ensure devices and services operate with the most efficient, cost-effective technology and are interoperable and technologically compatible. Marketing personnel, for example, locate and expand product platforms and assist the outreach department in educating the hearing and speech impaired community in how to use TRS products and how to configure the applications over a variety of devices and platforms.

As the Commission has acknowledged before, relay users historically have been isolated and under-served consumers of telecommunications services. The unavailability of telecommunications services has contributed to hearing-and-speech-impaired consumers being under and unemployed and has limited their opportunities to be full participants in their respective communities.[17] The marketing and advertising activities described above are an essential component of TRS providers' efforts to educate consumers about the availability and uses of TRS services. Accordingly, as a matter of policy, no deterrent should be made upon providers doing their absolute best to contact and educate TRS users regarding technological enhancements and access improvements. Eliminating funding for these types of marketing and advertising activities will only serve to keep these hearing and speech impaired consumers at a disadvantage.

II. NECA Failed to Provide Information Providers Need to Determine Whether Cost Projections Are Sufficient to Compensate Providers of VRS Services.

[17] *First Report and Order*, ¶ 104.

In calculating the reimbursable rate for VRS services, NECA made two adjustments to the data providers submitted for VRS services. First, NECA determined that providers' demand projections for VRS services for the upcoming year were too low. NECA, therefore, increased aggregate demand projections for VRS services. Next, NECA recognized that its projected increase in VRS demand also would mean that providers' VRS cost projections also were too low. NECA noted particularly that the "additional minutes will add to the cost of relay center operations, as well as potentially other VRS-related costs ...."[18] Accordingly, NECA increased aggregate VRS cost projections by multiplying the revised demand quantity by the weighted average relay center operations expenses submitted by providers and the adjusted weighted average per minute indirect expense. These revised variable costs were then added to other cost categories to obtain the cost input for NECA's VRS rate formula. In doing so, NECA provided no information to providers about how its revised demand projections affected any one provider and also sought no information from providers about how its revised demand projections might affect that provider's costs. NECA's failure to provide this information makes it impossible for providers to determine whether NECA's projected cost increases for VRS services are reasonable and, therefore, to verify that the VRS rate calculated using those cost projections is sufficient to compensate providers for meeting that increased VRS demand.

Although NECA assumed, correctly, that an increase in demand would add to the cost of relay center operations, NECA failed to obtain from providers information necessary for NECA to determine the magnitude of those cost increases. The effect of an increase in demand on any provider's costs of providing VRS services depends upon a number of variables including, but not limited to, the size of the projected demand increase and the likelihood that the increase

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18 *Payment Formula and Fund Size Estimate* at 19.

would affect any particular relay center. This type of cost information was necessary for NECA to calculate a weighted average that reflected true provider costs.

Because providers do not know how NECA allocated the increased VRS demand to any one provider, it is impossible for providers to determine what effect, if any, the projected increase in demand would have on their costs. If, for example, NECA projected that a large portion of the increase would be handled by Verizon, then the effect that increase would have on Verizon's costs may be greater than NECA's current calculation assumes. The VRS centers that would handle the projected increase in demand for Verizon may already be at full capacity or may not have a sufficient number of certified interpreters to meet that demand. Where that is the case, the increased cost to relay center operations may be greater than NECA's current cost calculation assumes. Verizon may have larger capital expenditures to build new centers or may incur hiring and labor costs much larger than NECA's current calculation assumes. But because providers received no information about how NECA allocated the increased demand or how specifically it determined that increase would affect the cost of relay center operations, Verizon is unable to evaluate the validity of NECA's assumptions.

To ensure that the weighted average NECA used in calculated providers' VRS costs is an accurate reflection of the true costs of meeting NECA's increased demand projections, providers would need to know how NECA allocated the increased VRS demand among various VRS providers and would need to re-calculate and re-submit to NECA data reflecting how the increased in demand would affect their particular cost structure. In the absence of information about how NECA allocated increased demand projections, providers have no ability to determine whether NECA's increased cost projections are sufficient to cover that demand and, therefore, whether the rate NECA has calculated will be sufficient to compensate providers for the reasonable cost of providing VRS service.

III. Conclusion

For the foregoing reasons, Verizon requests that the Commission direct NECA to revise its costs calculations to include providers' marketing and advertising costs and allow providers to submit additional data reflecting increased costs associated with NECA's provider level projections for VRS.

Respectfully submitted,

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